UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JANE MERRILL,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-39-B-W***
	)	
MICHAEL J. ASTRUE,[1]	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") appeal raises the questions whether the administrative law judge treated the opinions of certain medical providers correctly and whether the Appeals Council properly used certain regulations as a framework for decision-making. I recommend that the commissioner's decision be affirmed.

The procedural history of this case is more complicated than is usual with cases involving applications for Social Security benefits. Two applications, two administrative law judge decisions and a

[1] Pursuant to Fed. R. Civ. P. 25(d)(1), I have substituted new Commissioner of Social Security Michael J. Astrue as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 22, 2007 pursuant to Local Rule 16.3(a)(2)(C), requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

decision of the Appeals Council are involved. The matter has been remanded once by this court.[3] Docket No. 9. For the purposes of this appeal, however, it is only the decision of the administrative law judge dated October 19, 2004 and the decision of the Appeals Council that need be considered.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had sufficient quarters of coverage to remain insured under the Social Security Act only through March 31, 1998, Finding 1, Record at 561; that during the period at issue the plaintiff suffered from degenerative disc disease of the lumbar spine, bilateral carpal tunnel syndrome, obesity and diabetes mellitus, impairments that were severe but which did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings"), Findings 3-4, *id*.; that her assertions concerning her impairments and their impact on her ability to work during the relevant period (July 8, 1997 through December 18, 2000) were only partially credible, Finding 5, *id*.; that during the relevant period the plaintiff retained the residual functional capacity to perform the exertional demands of light work, as she was capable of lifting and carrying ten pounds frequently and twenty pounds occasionally and of occasional fine and gross manipulation, balancing, stooping, kneeling, crouching and crawling, and she required a sit/stand option, Finding 6, *id*. at 562; that at the relevant time she was incapable of returning to her past relevant work, Finding 7, *id*.; and that given her age (43), education (high school), lack of transferable skills, and residual functional capacity at the relevant time, use of Rule 202.21 from Appendix 2 to Subpart P, 20 C.F.R. Section 404 (the "Grid") as a framework for

[3] This court's remand order is dated July 23, 2002. Record at 621. The Appeals Council did not remand the case to an administrative law judge until December 10, 2003. *Id*. at 620. At oral argument, counsel for the commissioner proffered as an explanation for this 18-month delay the possible complication of other pending applications from the plaintiff, but the Appeals Council's remand order makes no mention of any other application. *Id*. at 619-20. Even if that were an accurate (*continued on next page*)

decision-making led to the conclusion that the plaintiff was capable of making a successful adjustment to work which existed in the national economy in significant numbers during that period, Findings 8-12, *id*.; and that the plaintiff accordingly was not disabled as that term is defined in the Social Security Act at any time during the relevant period, Finding 13, *id*.

The Appeals Council decided, *id*. at 545, to "consolidate the claims" in the plaintiff's applications for benefits dated October 4, 1999 and October 30, 2001 and to "resolve the discrepancies in the hearing decisions" dated September 25, 2003, in which benefits for the period beginning on December 18, 2000 were awarded, *id*. at 544, and October 19, 2004, in which benefits for the period of time between the alleged onset date of July 8, 1997 and December 18, 2000 were denied, *id*. at 563. The Appeals Council specifically informed the plaintiff that it "propose[d] to adopt the Administrative Law Judge's findings and conclusions contained in the October 19, 2004 hearing decision." *Id*. at 545. The Appeals Council's decision does just that, specifically adopting the administrative law judge's findings and conclusions. *Id*. at 539. The decision states that "the Council concurs and finds that using Medical-Vocational Rule 202.21 as a framework for decision-making, the claimant was not disabled" during the relevant period. *Id*. This decision is the final determination of the commissioner. 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn.

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explanation, such a delay is unacceptable.

Richardson v. Perales, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge and the Appeals Council reached Step 5 of the sequential review process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 136, 147 n.5 (1987); *Goodermote*, 647 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff asserts that the Appeals Council "made one important change to [the] basis for the ALJ's decision. Rather than rely upon the vocational testimony in the record, the Council . . . explicitly based its decision upon Medical-Vocational Rule 202.21 as a framework for decision-making[.]" Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 16) at 1. She argues, briefly, that her "significant hand and arm use limitations" preclude the use of the Grid in this manner. *Id*. at 11.[4] As recited above, the Appeals Council's letter agreeing to review the administrative law judges' decisions and its decision both make clear that the Appeals Council was in fact adopting the administrative law judge's conclusions with respect to the period at issue in this appeal, and the administrative law judge's opinion uses

[4] At oral argument, counsel for the plaintiff argued in addition that the administrative law judge's determination that the plaintiff required a sit/stand option also "takes us out of the Grids," citing my recommended decision in *Haskell v. Massanari*, 2001 WL 912400 (D. Me. Aug. 13, 2001). As is the case with the *Nixon* and *Brown* recommended decisions discussed in the text of this recommended decision below, the *Haskell* decision merely holds that the Grid may not provide the sole basis of decision under such circumstances. It does not preclude the use of the Grid as a framework for decision-making, so long as a vocational expert is consulted, as occurred in this case.

the Grid as a framework for decision-making. Record at 562. Thus there was no change at the Appeals Council in this regard.

The administrative law judge found that the plaintiff was "capable of occasional fine and gross manipulation[.]" *Id*. The plaintiff's only specific mentions of entries in the medical records that might support her characterization of her condition at the relevant time as suffering from "significant hand and arm use limitations," Itemized Statement at 11, are Dr. Herland's December 2001 opinion that she should do "no overhead reaching beyond once or twice an hour[,]" *id*. at 2, and Dr. Graf's opinion in June 2003 that she was "substantially impaired in basic functional movement patterns of . . . pushing, pulling, and fingering . . . .[,]" *id*. at 3. The statement from Dr. Herland, who treated the plaintiff for back pain, Record at 700, cannot reasonably serve as evidence of "significant hand and arm use limitations." In addition, nothing in Dr. Herland's records would allow one to draw a reasonable inference to the effect that the stated limit on overhead reaching existed before March 31, 1998. With respect to the statement of Dr. Graf, who apparently saw the plaintiff once at the request of her attorney, *id*. at 950, his list of physical limitations is stated in the present tense, and his assertion that the plaintiff "has essentially been disabled for sustained employment since before March 31, 1998" is not tied to any of the specific limitations listed earlier, *id*. at 952. Dr. Graf does not mention whether any of the limitations he lists are based on physical impairments that worsened over time or were equally intense in 1998 as they were in 2003 (with some medical basis for such a conclusion) nor does he attempt to indicate which of the limitations, either alone or in some combination, was sufficient to render the plaintiff "disabled for employment" in 1998.

The plaintiff cites two of my recommended decisions in support of her argument, as well as two Social Security Rulings. Itemized Statement at 11. She asserts that the recommended decisions stand for the proposition that "significant limitations on bilateral manual dexterity preclude the use of the Medical-

Vocational rules (also known as the 'grid')," *id.*, but that is not the case. In both *Nixon v. Barnhart*, Docket No. 05-193-P-S (Recommended Decision dated 6/1/06), and *Brown v. Barnhart*, Docket No. 06-22-B-W (Recommended Decision Dated 12/6/06), the issue involving the Grid was its use ostensibly as a framework for decision-making when in fact the administrative law judge relied solely on the Grid. *Nixon*, slip op. at 9-13; *Brown*, slip op. at 7-10. In this case, the administrative law judge did pose to a vocational expert a hypothetical question that included the exertional and non-exertional limitations he found to have existed at the relevant time, Record at 1029, which distinguishes this case from *Nixon* and *Brown*, because the administrative law judge did not rely solely on the Grid. Social Security Ruling 83-14, one of the two cited by the plaintiff, does direct that any limitations on the gross use of the hands to grasp, hold and turn objects when a claimant has been assigned a residual functional capacity for light work "must be considered very carefully to determine its impact on the size of the remaining occupational base of a person who is otherwise found functionally capable of light work." Social Security Ruling 83-14, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 46. Here, the administrative law judge followed this directive by including a limitation to "only occasional use of the hands" in his hypothetical question to the vocational expert. Record at 1029. Social Security Ruling 85-15, the other ruling cited by the plaintiff, requires the assistance of a vocational expert when "[s]ignificant limitations of reaching or handling" are present. Social Security Ruling 85-15, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 350. Again, the administrative law judge in this case complied with this directive.

At oral argument, counsel for the plaintiff contended for the first time that the two jobs identified by the vocational expert in response to the administrative law judge's hypothetical question at the hearing required frequent handling, which was inconsistent with the terms of the hypothetical question and accordingly rendered them unavailable for the commissioner's consideration. The hypothetical question

asked for jobs at the sedentary or light level with a sit/stand option that required only occasional use of the hands and were unskilled. Record at 1029. The administrative law judge later appeared to modify the terms to "without a lot of upper extremity activity." *Id*. at 1030. The vocational expert identified the jobs of surveillance system monitor, for which he gave the DOT number 379.367-058, and recreation aide, DOT number 195.367-030. *Id*. at 1030, 1033-34. Counsel for the plaintiff argued that the surveillance system monitor job is semi-skilled and that both jobs require frequent handling, making them non-responsive to the hypothetical question.

The recreation aide job does require frequent handling, but only occasional fingering. *Dictionary of Occupational Titles* ("DOT") (U.S. Dep't of Labor 4th ed. 1991) § 195.367-030. The residual functional capacity found by the administrative law judge limited the plaintiff to "occasional fine and gross manipulation," Record at 562, but does not include any other limits on handling. In the world of Social Security, "gross manipulation" equates to "handling." *See, e.g.*, *Brown*, at *4; *Headin v. Barnhart*, 2005 WL 1356066 (W.D.Va. June 7, 2005), at *6; *Curtis v. Barnhart*, 2003 WL 22389178 (N.D.Ill. Oct. 21, 2003), at *2. Thus, the recreation aide job does appear to be unavailable.

There is no job listed in the DOT as the number given by the vocational expert in connection with the surveillance system monitor job. A job with that title is listed at section 379.367-010, which states that handling and fingering are "not present." DOT § 379.367-010. It also carries an SVP ("specific vocational preparation") level of 2, which makes it unskilled. *Lewis v. Barnhart*, 2006 WL 3519314 (D.Me. Dec. 6, 2006), at *4. This job would fit within the residual functional capacity assigned by the administrative law judge and within his hypothetical question to the vocational expert. Counsel for the plaintiff contended at oral argument, however, that under cross-examination the vocational expert testified that he was really not talking about the surveillance system monitor position, but rather a security guard position that is semi-

skilled. The vocational expert did testify that the description of the job of surveillance system monitor in the DOT "has been expanded to include" other settings and that a new system used by the Department of Labor "might" include security guards under the title of surveillance system monitor. Record at 1036. This explanation, however, was all in aid of the vocational expert's attempt to estimate the number of jobs available in Maine at the relevant time that fell within the DOT definition. *Id*. at 1035-42. At no time did the vocational expert testify that the job he identified as responsive to the hypothetical question was anything other than the job described in the DOT. That job accordingly was available for the administrative law judge's consideration and no remand is required on this basis.

The plaintiff's remaining argument addresses the evidence of her back pain. She contends that the administrative law judge improperly rejected retrospective opinions of Dr. Herland and Dr. Graf and the contemporaneous report of Dr. Suske.[5] Itemized Statement at 2, 8. The only report of Dr. Suske in the record is a report of a consultative evaluation performed for the state disability determination service on or about March 24, 1997. Record at 405-07. Dr. Suske diagnosed morbid obesity, somatic dysfunction, ilio-lumbar syndrome due to lumbrosacral strain and sprain, diabetes mellitus, hypothyroidism and degenerative joint disease for which he recommended weight loss and conditioning, x-rays of her hands, wrists and lumbar spine, and a bilateral lower extremity EMG to rule out neurological deficit. *Id*. at 406-07. The plaintiff merely cites this report as "consistent with" Dr. Herland's opinion. Itemized Statement at 8. I

[5] The plaintiff also mentions the opinion of Dr. Kousaie. Itemized Statement at 5, 8, 10. Dr. Kousaie's two-page report of his consultative examination of the plaintiff on February 22, 2002 for the state disability determination service cannot possibly be read to present a retrospective opinion of any kind or to allow the drawing of any inferences with respect to the period before March 31, 1998. Record at 849-50. At oral argument, counsel for the plaintiff contended that this report "dates the carpal tunnel problem back 20 years . . . and the back problem back to 1988." Dr. Kousaie does report that the plaintiff "claims" that she "developed bilateral carpal tunnel and had surgery approximately 20 years ago" and that she stated that her back pain "started in approximately 1988," Record at 849, but neither of these self-reports by the plaintiff is tied in any way to any physical limitations existing before the date last insured.

do not see how Dr. Suske's opinion is inconsistent with the residual functional capacity assigned by the administrative law judge. Dr. Suske does not assign any physical limitations at all in his report.

The plaintiff relies, *id*. at 3, on the retrospective opinion of Dr. Graf, cited in full above, on the issue reserved to the commissioner ("This patient has essentially been disabled for sustained employment since before March 31, 1998[.]"), Record at 952, and the statement in 2004 of Dr. Herland, who treated the plaintiff for pain for a period of a year in 2001, *id*. at 693, that "it is difficult for me to understand why anyone would think that [the plaintiff] did not become disabled until 10/30/01. I would have to agree with Dr. Graf's findings," Record at 714. She discusses Dr. Herland's findings and 2001 report at length, Itemized Statement at 3-5, 8-10, and argues that they should be given controlling weight under 20 C.F.R. § 404.1527(d) and Social Security Ruling 96-2p, *id*. at 3-4. The problem with this argument is that both Dr. Graf and Dr. Herland offer, with respect to the period before the date last insured, only a conclusory assertion that the plaintiff was disabled at that time, a question that is reserved to the commissioner. 20 C.F.R. § 404.1527(e)(1)-(3). No special significance is assigned to such opinions. 20 C.F.R. § 404.1527(e)(3). Treating-source opinions on issues reserved to the commissioner are entitled to consideration based on the six enumerated factors set forth in 20 C.F.R. § 404.1527(d)(1)-(6), which are discussed by the plaintiff with respect to Dr. Herland, Itemized Statement at 8-10. An administrative law judge must explain the consideration given to a treating source's opinion under these circumstances. Social Security Ruling 96-5p ("SSR 96-5p"), reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2006) at 127.

The administrative law judge found that "Dr. Herland's opinions are not well supported with respect to the period at issue, and are not consistent with the record as a whole," and that Dr. Graf's "retrospective opinion appears to be based on the claimant's self-reports rather than independent medical findings,"

Record at 557. The plaintiff contends that Dr. Herland's opinions are consistent with other medical evidence in the record, Itemized Statement at 5, but with the exception of Dr. Suske's report and Dr. Graf's one-sentence conclusion, that evidence concerns only the period after the date last insured. The plaintiff asserts that Dr. Suske "opined that the Plaintiff could not 'sit, stand or walk for prolonged periods of time" and "has limited lifting, carrying and bending abilities," *id*. at 5 n.4, but it is clear that this portion of Dr. Suske's report is merely a record of the plaintiff's own statements, Record at 405-06, rather than his opinions, which are found at the end of his report, *id*. at 406-07. It is quite accurate to say that Dr. Herland's retrospective opinion of 2004 is not well supported by his own records from 2001 and 2003, which are not concerned with the period before the date last insured. *Id*. at 831-46, 911. Dr. Graf's retrospective conclusion lacks any analysis or reasoning tying it to his findings in 2003.[6] Under these circumstances, the administrative law judge has complied with SSR 96-5p and the residual functional capacity assigned for the relevant period is supported by substantial evidence.[7]

This conclusion makes it unnecessary to consider the plaintiff's contention that the administrative law judge was not entitled to rely on the evaluations performed by the state-agency physician reviewers due to the failure of those reports to comply with the requirements of Social Security Ruling 96-8p, Itemized Statement at 6-8, an argument with which I have some sympathy with respect to Dr. Johnson's 2002 report, Record at 895-202, which cannot fairly be characterized as "includ[ing] a narrative discussion

[6] At oral argument, counsel for the plaintiff identified the following when asked what entries in Dr. Graf's report supported his retrospective opinion: that the limitations due to bilateral carpal tunnel syndrome had resolved so long as the plaintiff did not do repetitive tasks, that she had last worked in 1999, and that Dr. Graf found significant changes based on his review of films from 1998. The record reflects that the first two items are based solely on the plaintiff's statements to Dr. Graf, Record at 950-51, and in any event do not establish any degree of severity for any impairment during the relevant time period. The third item supports, at most, an inference that the impairments were less severe at the relevant time than they were at the time of Dr. Graf's review in 2003, *id*. at 951, an inference which is similarly of no use in determining whether those impairments were themselves severe at the relevant time.

[7] Residual functional capacity is established at Step 4 of the commissioner's evaluative process, where the burden of (*continued on next page*)

describing how the evidence supports each conclusion, citing specific medical facts . . . and nonmedical evidence," Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2002) at 149.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of March, 2007.

David M. Cohen
United States Magistrate Judge

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proof rests with the claimant. 20 C.F.R. § 404.1520(e); *Yuckert*, 482 U.S. at 146 n.5.

V.

Defendant

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